

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2249

Cir. Ct. No. 2015CV75

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DONALD PAVLAK AND CYNTHIA PAVLAK,

PLAINTIFFS-APPELLANTS,

V.

DAVID W. BECHARD AND ROBERT NIEDERDORFER,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments and orders of the circuit court for Waushara County: GUY D. DUTCHER, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Donald Pavlak and Cynthia Pavlak appeal circuit court orders dismissing their claims and entering judgments on the pleadings in favor of David Bechard and Robert Niederdorfer, as well as an order denying a

motion for reconsideration. For the reasons set forth below, we affirm the judgments and orders of the circuit court.

BACKGROUND

¶2 The Pavlaks purchased real property in Waushara County in 1999. Prior to the purchase, David Bechard conducted an appraisal of the property at the request of the Pavlaks' lender. In 2001, the Pavlaks refinanced the property. Another appraisal was done, this time by Robert Niederdorfer. For purposes of this opinion, we will assume that both appraisal reports incorrectly indicated that the house on the property had a block foundation.¹ In 2013, the Pavlaks entered into a contract to sell the property for \$195,000. An appraisal was done at that time valuing the property at \$175,000. The 2013 appraisal correctly stated that the property had a wood foundation. The buyers renegotiated the contract, and purchased the property from the Pavlaks for \$175,000.

¶3 The Pavlaks filed a complaint against Bechard and Niederdorfer, alleging negligent misrepresentation. Niederdorfer filed a motion to dismiss together with his answer. Bechard filed an answer and then later filed a separate motion titled Motion to Dismiss/Judgment on the Pleadings. The circuit court granted both motions to dismiss, and entered judgments on the pleadings as to both defendants. The Pavlaks now appeal.

¹ One of the appraisal reports indicates that the foundation was "concrete block"; the other report indicates that the foundation was "block."

DISCUSSION

¶4 “A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint.” *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). For purposes of review, we accept as true the facts stated in the complaint, along with all the reasonable inferences that may be drawn from those facts. *See id.* Our review of a circuit court’s order granting a defendant’s motion to dismiss is de novo. *Mayo v. Boyd*, 2014 WI App 37, ¶8, 353 Wis. 2d 162, 844 N.W.2d 652.

¶5 Similarly, whether a claim is capable of surviving a judgment on the pleadings is a question of law, which we also review de novo. *DeBraska v. Quad Graphics, Inc.*, 2009 WI App 23, ¶12, 316 Wis. 2d 386, 763 N.W.2d 219. When reviewing a motion for judgment on the pleadings, our first step is to determine whether the complaint states a claim on which relief can be granted. *Jares v. Ullrich*, 2003 WI App 156, ¶8, 266 Wis. 2d 322, 667 N.W.2d 843. If so, we look to the responsive pleadings to determine whether a material factual issue exists. *Id.*

¶6 Although our review is de novo, we agree with the circuit court’s conclusion that the Pavlaks’ complaint fails to state a claim upon which relief may be granted. The complaint alleges that appraisers Bechard and Niederdorfer made negligent misrepresentations of fact regarding the house’s foundation. Negligent misrepresentation is a species of fraud. *See Bellon v. Ripon Coll.*, 2005 WI App 29, ¶6, 278 Wis. 2d 790, 693 N.W.2d 330 (“A species of fraud, misrepresentation may take one of three familiar tort classifications: intentional, negligent, and strict

responsibility.”). WISCONSIN STAT. § 802.03(2)² requires heightened pleading specificity for claims based on fraud or mistake. The statute provides, in relevant part, that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” *Id.*

¶7 Negligent misrepresentation has four elements that must be proven:

- (1) The defendant must make a representation of fact;
- (2) the representation of fact must be untrue; (3) the defendant must have been negligent in making the representation; and (4) the plaintiff must have believed that the representation was true and have relied upon it to his detriment.

Goossen v. Estate of Standaert, 189 Wis. 2d 237, 250, 525 N.W.2d 314 (Ct. App. 1994). Even if we assume, without deciding the issue, that the Pavlaks have alleged sufficient facts as to the first three elements, their complaint fails to allege facts indicating what detriment or damages they suffered as a result of the appraisers’ misrepresentations.

¶8 The Pavlaks assert that they were damaged in the amount of \$20,000 because that is the amount that the sale price of their property was reduced after a new appraisal was done in 2013. However, the complaint fails to make a causal connection between the reduction in the 2013 sale price and Bechard’s 1999 appraisal. The Pavlaks attempt to argue on appeal that they incurred a loss of their ability to renegotiate the 1999 purchase price, but this assertion was not included in the complaint. In reviewing a motion to dismiss, we may only consider the facts as pled; facts are not to be added in the process of giving liberal construction

² All references to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

to the pleadings. See *Wilson v. Continental Ins. Cos.*, 87 Wis. 2d 310, 319, 274 N.W.2d 679 (1979). Here, the complaint lacks allegations as to what effect, if any, Bechard's 1999 appraisal had on the purchase price the Pavlaks paid for the property. The Pavlaks do not assert in the complaint that, had they known in 1999 that the house had a wood foundation, they would not have purchased the property or that they would only have purchased it for a lesser price. And we cannot tell from the pleadings whether the price the Pavlaks paid for the property was the same as the value shown in Bechard's 1999 appraisal or some other number. In sum, the complaint fails to plead any facts at all, let alone with the particularity required by WIS. STAT. § 802.03(2), regarding how the Pavlaks were damaged as a result of their reliance on Bechard's 1999 appraisal.

¶9 The allegations in the complaint against Niederdorfer are even less specific regarding damages. Niederdorfer's 2001 appraisal was done for refinance purposes more than two years after the Pavlaks purchased their property and, therefore, had no effect on the purchase price the Pavlaks paid. In order to establish that they suffered damages as a result of Niederdorfer's appraisal, the Pavlaks would have had to allege facts regarding how they relied on his appraisal to their detriment. The complaint alleges no such facts. For example, nothing in the complaint asserts that the Pavlaks incurred costs that they would not otherwise have incurred based on a belief that their property was worth \$185,000, as stated in Niederdorfer's appraisal. Therefore, we conclude, as did the circuit court, that the Pavlaks fail to state a claim for negligent misrepresentation against Niederdorfer.

¶10 The Pavlaks also argue that the circuit court erroneously exercised its discretion in denying their motion for reconsideration, in which they requested that the court vacate its dismissal orders and permit the filing of an amended

complaint. To prevail on a motion for reconsideration, a movant must present either newly discovered evidence or establish a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. The Pavlaks' motion for reconsideration did not assert that either of these grounds existed and, therefore, we are satisfied that the circuit court properly exercised its discretion in denying the motion.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

